Issue date: 08Nov2001

U.S. Department of Labor **Office of Administrative Law Judges**
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CASE NO.: 2000-LHC-1637

OWCP No.: 03-27212

In the matter of

FREDERICK BELL,
Claimant

v.

MON VIEW MINING COMPANY ,
Employer

and

AMERICAN MINING INSURANCE COMPANY,
Carrier

APPEARANCES:

Debra L. Henry, Esquire
For the Claimant

Sean B. Epstein, Esquire
For the Employer

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This case arises from a claim for compensation under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et. seq*., hereinafter referred to as the "LHWCA" or the "Act" and the implementing regulations, 20 C.F.R. parts 701 and 702. The Act provides compensation to certain employees engaged in maritime employment for occupational diseases or unintentional work-related injuries, irrespective of fault, occurring upon the navigable waterways of the

United States or certain adjoining areas, resulting in disability or death. With limited exceptions, the Act provides the exclusive remedy for such injuries against maritime employers which have secured the payment of benefits.

PROCEDURAL HISTORY[1]

The claimant filed his claim on October 10, 2000. The claimant seeks temporary total disability benefits from April 5, 1999 through, June 9, 1999, and temporary partial disability benefits thereafter for injuries sustained on January 27, 1999. On March 20, 2000, the Director, Office of Workers' Compensation Programs (OWCP), referred this case to the Office of Administrative Law Judges (OALJ) for a hearing. The case was assigned to me on June 22, 2000.

A formal hearing was held before the undersigned on January 10, 2001, in Pittsburgh, Pennsylvania, at which the parties were given a full and fair opportunity to present evidence and argument. No appearance was entered for the Director, Office of Workers' Compensation Programs ("OWCP"). Claimant's Exhibits (CX) 1-22 and Employer's Exhibits (EX) 1-2 were admitted to the record post-hearing without objection. (TR 42). The record remained open, at length, post hearing for the submission of additional medical evidence and closing briefs. The employer did not take advantage of the post-hearing opportunity to clarify the matter of availability of post-June 1999 overtime with superintendent Barone. (TR 42). However, a post-hearing MRI report from the employer's physician, Dr. Lieber was permitted and received. (TR 47).

I. STIPULATIONS[2]

The parties stipulate and I find:

A. The claimant is covered by the Act which applies to this proceeding. (TR 5).

B. The claimant and the employer were in an employee-employer relationship at the relevant times.

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[1] The following references will be used: "TR" for the official hearing transcript; "ALJ EX" for an exhibit offered by this Administrative Law Judge; "CX" for a Claimant's exhibit; "DX" for a Director's exhibit; "IX" for a Carrier's exhibit; and, "EX" for an Employer's exhibit.

[2] The private parties cannot bind the Special Fund absent the Director's agreement to the stipulations. *Brady v. J. Young & Co.*, 17 BRBS 46 (1985), *aff'd on recon.*, 18 BRBS 167 (1985) *cited with approval in Gupton v. Newport News Ship Building and Dry Dock*, 33 BRBS 94 (1999). Stipulations affecting the Special Fund may be accepted if there is evidence of record to support them. *Justice v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 97 (2000)(proper to accept stipulation involving non-party) *citing McDougal v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd in part sub. nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT)((th Cir. 1993).

C. The claimant sustained an injury on January 27, 1999.

D. The injury occurred in the course and scope of the claimant's employment.

E. Medical benefits, under section 7 of the Act, have been paid in by the employer.

F. The claimant's average weekly wage ("AWW") is $ 1,369.00. (TR 9).

G. The last payment of benefits was made by the employer on April 15, 1999. (TR 9).

H. The claimant had not reached MMI, as of the hearing date. (TR 36).

I. Temporary total benefits were paid from 1/28/99 through 4/17/99 for a total of $7914.00.

II. ISSUES

Whether the claimant is entitled to compensation benefits from April 5, 1999 to June 9, 1999, when he worked on restricted duty, due to his January 27, 1999 injury, and whether he is entitled to compensation for missed overtime work, subsequent to June 9, 1999, due to the injury?

III. FINDINGS OF FACT

A. BACKGROUND

The claimant is fifty-two years old, has a high school education and is a resident of Cannonsburg, Pennsylvania. He began working for the employer in 1994 as a mechanic. His daily worked involved lifting 50 to 100 pounds regularly. (TR 14). Mr. Bell had had prior work-related neck and lower back injuries and problems, as well as prior surgeries on his right elbow (1998) and left hand (1962). On January 27, 1999, the claimant injured or re-injured himself while working on a barge at the employer's facility on the Monongahela River, in Pennsylvania. Three workers, including the claimant, had attempted to lift a large cable from the side of a barge over their heads. According to Mr. Bell, one worker released it without warning and the claimant "caught the jolt" which hurt his neck and lower back. (TR 14). He reported the injury then went home to self-treat. He visited Dr. Michalski the next day. (TR 15). He returned to limited duty work in April 1999, but was unable to work a full day. Thus, he discontinued work until some time in June 1999 when he once again began limited duty, but was not afforded his regular, pre-injury overtime.

B. CLAIMANT'S EVIDENCE

Claimant's Testimony

Mr. Bell was first seen for his injury on January 28, 1999, by Dr. Michalski. He has also been seen by Drs. Prostko, Whiting, Platto, McNulty, and Lodico. (TR 15). As a result of the injury, he was off work from February 12, 1999 through April 4, 1999. (TR 15). Between either April 9, 1999 or April 15, 1999, he had returned to attempt light duty. (TR 16, 23). He continued to suffer daily pain and see a doctor. While Dr. Liss continued to write light duty slips for him, he felt he could not work. (TR 25). On April 19, 1999, he received a letter from Mr. William Dean, General Superintendent, informing him not to return to work if he could not work eight hours a day, five days per week. (TR 17; CX 20). So, he continued with therapy for his lower back, then ran out of money and returned to work on June 9, 1999. (TR 16-17).

He is still employed as a mechanic and paid at that rate, now, a post-$1.00-raise rate of $18.26 per hour. (TR 26). As of the January 10, 2001, hearing date, he continued to suffer headaches, a stiff neck and neck pain. (TR 17-18). As of June 9, 1999, he did not lift or carry anything, except a water hose. (TR 16). Now, he walks to the river to relieve the barge loader to watch the barges, but primarily walks up and pushes buttons (at a panel board). (TR 16). His treatment has involved "blocks" and therapy at Novacare. (TR 16). He takes Celebrex, 100 milligrams, and Ibuprofen. (TR 19). He has not been pain free since January 27, 1999. (TR 20). Although willing, he could not return to his duties as a mechanic because of the heavy lifting and awkward positions required. (TR 22-23). If permitted, he would be willing to work overtime within his duty restrictions. (TR 23, 34). Dr. Platto is his treating physician. (TR 34). His last physical therapy was in April or May 1999. (TR 36). No physician has recommended surgery for either his neck or back. (TR 36).

Prior to his January 27, 1999 injury, he worked "voluntary" overtime two hours per work day, including eight hours on Saturdays and with an eight-hour "option" on Sundays for an average of 26 hours overtime per week. (TR 20-21, 29). Essentially, mechanics could work overtime as they desired. (TR 29-30). He would not always work the eight hours on Sundays. (TR 29). While the mechanics had the option of declining overtime, nobody did so. (TR 30). Overtime pay was 1.5 times the hourly rate and twice the rate on Sundays. (TR 38). He has not been permitted to work overtime since June 9, 1999, when he returned to work. (TR 20-22). He was informed, by the superintendent, Mr. Lenny Barone, there is no overtime for employees on restricted or light duty. (TR 22, 27). He was never listed on the overtime sign. (TR 32). He admitted there was a period of a "couple of months", i.e., until September 1999, during an economic "slowdown", when there was no (voluntary) overtime for anyone, e.g. they did not work Sundays or the two-hours overtime per day. (TR 28, 32-33). When the whole mine would work, they would work. (TR 28). Since September 1999, the claimant had not requested overtime work. (TR 34).

Physician Opinions

Office notes from Dr. Michael Platto, whose credentials are unknown, dated March 2, March 11, and March 12, 1998, were submitted regarding a prior affliction. (CX 9, 10, & 11). Mr. Bell complained of persistent radiating neck and lower back pain. Examination revealed limited range of motion of the lower back and neck. Dr. Platto's impression was: status post L4-L5 HNP with possible mild chronic right L5 radiculopathy-work injury 8/24/97; improving right lateral epicondylitis, status post surgery , 1/9/98; myofascial head, neck pain (not a new condition); and, sleep disturbance. (CX 9). Mr. Bell reported increasing neck pain with his 1998 work-hardening program, but improving lower back pain. (CX 10-11).

The claimant submitted an office note of his first visit to Dr. Michalski, whose credentials are unknown, on January 28, 1999. (CX 20). He was also status post right lateral epicondylectomy and debridement of extenso brevis tendons, January 9, 1998. Mr. Bell had previously been seen, December 3, 1998, for cervical strain, related to a work injury and had been on two weeks light duty. He had been off work from August through October 1997 for back problems. Mr. Bell informed Dr. Michalski he had "always had a little kink and soreness in his neck and has had difficulty turning to the right side, as well as a history of right arm numbness. Dr. Michalski's post-examination impression was: right rotator cuff tendinitis; right cervical strain; and, right lumbar strain. He was not permitted to work for the next two weeks. Dr. Michalski prescribed medications and physical therapy.

An office note of a follow-up visit to Dr. Michalski, dated February 11, 1999, was submitted. (CX 19). Mr. Bell reported his right shoulder was better, but his back continued to go out on him and was painful as was his neck. Dr. Michalski's post-examination impression was: healed right rotator cuff tendinitis; persistent right cervical strain greater than left; and, lumbar strain. He returned Mr. Bell to light duty for two weeks. (CX 18).

An office note of a follow-up visit to Dr. Michalski, dated February 25, 1999, was submitted. (CX 18). Mr. Bell had tried to return to work, but the tasks caused him pain and he quit after an hour. Mr. Bell reported his right shoulder was okay, but his neck was "still real bad." Dr. Michalski's post-examination impression was: healed right rotator cuff tendinitis; persistent right cervical strain greater than left; and, lumbar strain, essentially resolved. He returned Mr. Bell to light duty. (CX 18).

An office note of a follow-up visit to Dr. Michalski, dated March 4, 1999, was submitted. Dr. Michalski observed the February 26, 1999, MRI reading showed a right-sided disc herniation at C5-6 encroaching on the nerve root, mildly encroaching the thecal sac. Mr. Bell continued to suffer persistent right cervical pain. His impression was "Right C5-6 herniated disc nucleus pulposus with nerve root impingement at that level, which would indeed explain his symptomology." (CX 17). He was continued on light duty.

Office notes from Drs. McNulty and Platto, Spine Institute of Southwestern Pennsylvania, between October 22, 1999 and February 28, 2000, were submitted by the claimant. (CX 12, 13, 14, 15). They show he continued to tolerate his light duty work. Dr. McNulty wrote, "The patient has mechanical neck pain, asymptomatic right C5-6 herniated nucleus pulposus, also with mechanical low back pain with probable discogenic component, now with a right shift, asymptomatic right L4-5 herniated nucleus pulposus." Further physical therapy and evaluation was recommended. Dr. Platto's impression was; DJD cervical spine with small right C5-C6 HNP; moderately large L4-L5, now with radicular symptoms down right leg; underlying DJD of cervical and lumbar spine; and, possible DJD of hands and wrist. (CX 13). In January 2000, he was "doing okay at his light duty work" and allowed to continue with Dr. McNulty's assessment being: chronic mechanical neck and low back pain with asymptomatic right C5-6 herniated nucleus pulposus and asymptomatic right L4-5 herniated nucleus pulposus. (CX 14). On February 28, 2000, Dr. McNulty noted his neck was slightly more sore because of his recent welding, at work. He was allowed to continue on light duty. (CX 15).

Dr. Robert G. Liss, Orthopedic Associates of Pittsburgh, Inc., whose qualifications are not of record, examined the claimant on March 29, 1999, for neck and lower back pain. (CX 1). He noted the 1/27/99 injury and that some associated right shoulder pain due to rotator cuff tendinitis had resolved. Mr. Bell had previously injured his back in October 1997 while lifting pipe at work, had been off work ten months and returned in July 1998. During the hiatus, he had right elbow surgery for work-related lateral epicondylitis. A 2/26/99 MRI reading suggested a small, right-sided disc herniation at C5-6. Dr. Liss reviewed the MRI finding a degenerative appearing disc at C5-6 with a slight disc bulge. He wrote, "I am not sure I appreciate frank herniation; if there is herniation, it is quite small." Dr. Liss permitted a return to light duty as the claimant had no shoulder pathology at the time. He opined Mr. Bell is not a surgery candidate. Dr. Liss saw the claimant on an urgent basis for neck pain complaints, on April 9, 1999. (CX 4). He restricted him to sedentary work, but was not sure of the source of the pain. His impression was a flare up of chronic neck and lower back pain. (CX 4).

Dr. Liss examined Mr. Bell, on April 26, 1999, continuing light work restrictions. He found a limited range of neck motion but no neurologic compromise. (CX 5). Dr. Liss' followup of April 28, 1999, had no change. (CX 2). He saw Mr. Bell again, on April 16, 1999, for interscapular pain radiating to both scapulae. His impression was chronic myofascial pain, thoracic, and permitted him to continue light duty. (CX 3). On July 22, 1999, he wrote to Dr. Goldfarb that the herniated disc shown on MRI might be the cause of his neck and shoulder pain, but absent firm physical examination findings or a clear cut radicular pattern, "no such conclusion can be drawn." He recommended correlation of the MRI finding. (CX 6). On December 28, 1999, Dr. Liss wrote that he last saw Mr. Bell, on April 26, 1999, observing his symptoms persisted then and he had not recovered from the 1/27/99 injury. (CX 8).

An MRI report by Drs. Papa/Shetty, dated 2/26/99, revealed: "There is a small right sided disc herniation at the C5-6 level which is encroaching on the exiting nerve root and mildly encroaching on

the thecal sac. The cord is spared at this level." Further arthritic changes were seen, as well as mild intervertebral disc space narrowing, C3-C6. (CX 7).

C. EMPLOYER'S MEDICAL EVIDENCE

Physician Opinions

Dr. Paul S. Lieber's qualifications are not in the record. He reviewed the claimant's history and two MRIs of the claimant, dated October 30, 2000, and submitted two reports, dated August 24, 2001 and August 26, 2001. (EX 1 & 2). Dr. Lieber also reviewed medical records maintained by Dr. Mark Lodico dated June 21, June 28, and November 4, 1999. The MRIs revealed what appeared to be degenerative disc bulges from L1 through L5 which are spondylotic. What had been reported by radiologists as a suspicious disc herniation in the right paracentral region at L4-5 is not noted. Dr. Lieber stated this disc herniation was obviously present in 1997, based on the MRI, "and, so if anything, this disc herniation had improved." (EX 2). Disc bulging at L5-S1 appeared to be most prevalent and appeared to cause biforminal stenosis of the neural foramen. (EX 1). He made no acute findings.

Dr. Lieber opined Mr. Bell sustained a lumbrosacral strain/sprain (on January 27, 1999) which had resolved.[3] It also appeared Mr. Bell sustained a disc herniation at C5-C6, on January 27, 1999, but was not having symptoms of radicular arm pain. He therefore suspected most of his symptoms were related to the cervical facet C5-C6 level. Dr. Lieber concluded Mr. Bell is capable of continuing full time light duty work. (EX 2). He attached a "Functional Capacities" assessment to his report which shows the claimant "can" walk four hours per day, stand and drive two hours, and sit six hours. He cannot lift or carry items over 26 pounds, but may occasionally lift and carry 11-25 pound items and frequently lift and carry 0-10 pounds. He may fully use his hands and feet for repetitive motions. He can only occasionally climb, balance, kneel, squat, crawl, twist, bend at the waist, or reach. (EX 2).

Dr. Lieber opined a discography would not be an unreasonable procedure. However, the facet nerve block of June 28, 2000, failed to improve the claimant's symptoms significantly. Moreover, he opined it would be reasonable for Dr. LoDico to perform cervical facet nerve screening blocks in the cervical spine to consider whether Mr. bell would be a candidate for radio-frequency neurotomy.

D. LOST TIME AND UNCOMPENSATED MEDICAL EXPENSE EVIDENCE

The claimant submitted evidence establishing he lost the following time as a result of his work place injury: 4/7/99-sick day; 4/8/99-sick day; 4/12/99-bone scan day; 4/13/99-review bone scan;

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[3] The resolution date is not specified, but the report is dated August 26, 2001.

6/28/99-vacation day for facet nerve blocks; 6/29/99-vacation day for facet nerve blocks; and 6/1/200-Dr. Lieber evaluation. CX 16 is a listing of medical expenses and payments, of NovaCare Outpatient Rehabilitation from April 1998 through 2000, but not including the period surrounding Mr. bell's 1/27/99 injury and treatment.

The claimant submitted evidence establishing the following uncompensated medical expenses:

1999 Accordia insurance policy deductible	$ 1,000.00
01/17/00 Pain medicine check #1576	$ 20.00
05/23/00 Pain medicine check #1682	$ 40.00
07/21/00 Pain medicine check #1750	$ 10.00
09/21/00 Three Rivers Endoscopy, check # 1796	$ 25.00
11/20/00 Three Rivers Endoscopy, check #1842	$ 25.00
12/28/00 Three Rivers Endoscopy, check #1883	$ 32.70
Total	$ 1,157.70

E. Other

A letter by William Dean, respondent's General Superintendent, dated April 19, 1999, specifies that an eight-hour per day, five-day per week, light duty position was available with them since Dr. Liss had released him for light duty. The letter advised him if he chose not to work these hours it would constitute a refusal to perform the offered job. (CX 21). The letter memorializes that Mr. Barone had so advised Mr. Bell, on April 16, 1999.

The claimant submitted a "Weekend Work Schedule" for Saturday and Sunday 10/21/00-10/22/00 on which his name did not appear. (CX 22).

IV. CONCLUSIONS OF LAW

An injured person must satisfy four elements in order to receive compensation under the LHWCA. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 45 110 S.Ct. 381, 107 L.Ed.2d 278, 23 BRBS 96 (CRT) (1989). First, the person must be injured in the course of employment. 33 U.S.C. § 902(2). Next, the employer must have employees engaged in maritime employment. 33 U.S.C. § 902(4). Third, the injured person must have "status," that is, be engaged in maritime employment. 33 U.S.C. § 902(3); *Director, OWCP v. Perini N. River Assocs.*, 459 U.S. 297, 317, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983). Finally, the injury must occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903(a). This last element is the "situs" test. *E.g., Schwalb*, 493 U.S. at 45.

It is well established that, in arriving at his or her decision, an Administrative Law Judge is entitled to evaluate the credibility of all witnesses and to draw his or her own inferences and conclusions from the evidence. *Quinones v. H.B. Zachery, Inc.* 1998 WL 85580 (Ben. Rev. Bd. Feb. 10, 1998). Accordingly, the Administrative Law Judge's credibility determinations will not be disturbed unless they are inherently incredible or patently unreasonable. *Id.; Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

It has been consistently held that the Act must be construed liberally in favor of claimants. *Voris v. Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L. Ed. 5 (1953); *J. B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).

A. JURISDICTION[4]

In order for a claimant to be eligible for benefits, the LHWCA, as it was amended in 1972, required an injured worker to qualify under both a "situs" and a "status" test. *Pfeiffer Co. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed 2d 225, 11 BRBS 320 (1979).

The parties have agreed and I find that the claimant's employment as a mechanic, with the Employer, a maritime employer, constitutes qualifying maritime employment and that his regular work, at the time of the injury, at Mon View Mining's river front facility, which constitutes a qualifying adjoining situs satisfies the "situs" requirement. Thus, I find jurisdiction, under the Act.

RESPONSIBLE EMPLOYER[5]

For a claim to be compensable, under the Act, the injury must arise out of and in the course of employment. 33 U.S.C. § 902(2). Therefore, an employer-employee relationship must exist at the time of the injury. *American Stevedoring Limited v. Marinelli*, ___ F.3d ___, No. 00-4180, 35 BRBS 41(CRT)(2d Cir. 2001) *citing Fitzgerald v. Stevedoring Services of America*, BRB No. 00-0724, 2001 WL 94757, at 4 (2001)(en banc). Under the Act, an "employee" is defined as "any person engaged in maritime employment" and "employer" is defined as "an employer of any of whose employees are employed in maritime employment." 33 U.S.C. § 902(3), 902(4). The Board has applied three tests to determine if such a relationship exists: (1) the relative nature of the work (i.e., the nature of the claimant's work and its relation to the employer's regular business); (2) the right to control the details of the work; and, (3) Restatement (Second) of Agency, Section 220, subsection 2, which encompasses factors set forth in each of the other two tests. A judge must apply whichever test is best suited to the facts of the particular case. *Marinelli*. Since the claimant's injuries occurred while he was

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[4] Law of the Circuit in which injury occurs is applicable. *Roberts v. Custom Ship Interiors*, ___ BRBS ____ (May 15, 2001)(BRB No. 00-832).

[5] *See* 20 C.F.R. 703.003 for requirement for employers to secure coverage or qualify as authorized self-insurers.

employed by Mon View Mining, in January 1999, the named employer is the responsible employer. Nor do the parties contest this issue.

TIMELINESS OF NOTICE[6]

Section 912 sets out the requirements for timely notice to an employer of injury or death. 33 U.S.C. § 912. Generally, an employee has 30 days to provide notice, and the clock starts to run when reasonable diligence would have disclosed the relationship between his injury and his employment. § 912(a); 20 C.F.R. § 702.212(a). Section 920(b) establishes a presumption that sufficient notice of the claim has been given. An employer may rebut the presumption by presenting substantial evidence that it did not have knowledge of the employee's work-related injury or death. *See, Blanding v. Director, OWCP [Oldham Shipping]*, 33 BRBS 114(CRT)(2d Cir. 1999) *citing Stevenson v. Linens of the Week*, 688 F.2d 93, 98 (D.C. Cir. 1982). Failure to give timely notice may bar a claim. The parties do not contest this matter and I find timely notice was given.

TIMELINESS OF CLAIM

As a threshold matter, I must consider whether the claimant timely filed his claim. A worker must file an LHWCA claim within one year after the injury. 33 U.S.C.A. § 913(a); 20 C.F.R. § 702.221. Failure to file a claim within the year may bar any right to compensation. "The time for filing a claim shall not begin to run until the employee . . . is aware, or by reasonable diligence should have been aware, of the relationship between the injury or death and the employment." *Id*. In order to determine whether the prescription has run, "we look to the employee's appreciation of the relation between his injury and his employment. For the prescription to run against him, he must know (or should know) the true nature of his condition, i.e., that it interferes with his employment by impairing his capacity to work, and its causal connection with his employment." *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 1141 [16 BRBS 100(CRT)] (5th Cir. 1984) *but see LeBlanc v. Cooper/T. Smith Stevedoring*, No. 96-60767(5th Cir. Dec. 12, 1997)("awareness" requirement applicable only to occupational disease cases). (If voluntary payments have been made, a claim may be filed within one year of the last payment.) An employee becomes aware of this relationship if a doctor discusses it with him. *Aurelio v. Louisiana Stevedores*, 22 BRBS 418 (1989). Here, the parties do not contest the matter and I find the claim was timely filed.

INJURY

Section 2(2) of the LHWCA defines an "injury" as an accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. 33 U.S.C.

[6] See 20 C.F.R. § 701.401(c) regarding certain workers and their dependents covered by state compensation acts.

§ 902(2)*; see U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor*, 455 U.S. 608, 102 S.Ct. 1312 (1982), *rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980).

The claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish his prima facie case.[7] *Bolden v. G.A.T.X. Terminals Corp*., 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318, 71 L.Ed. 2d 495, [14 BRBS 631](1982); *Hargrove v. Strachan Shipping Co.*, 32 BRBS 11 (1998)(claimant need not prove impairment was "work-related" at this juncture only that conditions existed which could have caused it). An injury need not involve an unusual strain or stress; it makes no difference that the injury might have occurred wherever the employee may have been. *See Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Glens Falls Indemnity co. v. Henderson*, 212 F.2d 617 (5th Cir. 1954). The claimant must establish each element of his prima facie case by affirmative proof. *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed. 2d 221, 28 BRBS 43(CRT)(1994).

Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. *Bath Iron Works Corp. v. White*, 584 F.2d 569 (1st Cir. 1978).

Once the prima facie case is established, a presumption is created under Section 20(a) of the LHWCA that the employee's injury arose out of his or her employment.[8] 33 U.S.C. § 920(a). Moreover, Section 20(d) of the Act favors the claimant with a presumption that the injury suffered was not occasioned by the willful intention of the injured employee to injure or kill himself or another. *Green v. Atlantic & Gulf Stevedores, Inc*., 18 BRBS 116 (1986).

Once the presumption is invoked, the party opposing entitlement must present specific and comprehensive medical evidence proving the absence of or severing the (presumed) causal connection between such harm and employment or working conditions. *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996); *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995);

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[7] Or, as the Board stated in *Kier v. Bethlehem Steel Corp*., 16 BRBS 128 (1984), that the claimant has the burden of establishing: (1) he or she sustained physical harm or pain; and, (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. But, a connection between the work and the harm need not be established at this stage. *Accord, Kelaita*, 13 BRBS at 331.

[8] This presumption applies only to the issue of whether an injury arises in the course of employment and, thus, is work-related; not to the issues of the nature and extent of disability. *Carlisle v. Bunge Corp*., 33 BRBS 133, BRB No. 98-1604 (Sept. 13, 1999) *citing Jones v. Genco, Inc*., 21 BRBS 12 (1998).

Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 144 (1990); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989); *Conoco, Inc. v. Director, OWCP*, 33 BRBS 187 (CRT)(5th Cir. 1999); *Parsons Corp. of Cal. v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980). If an employer does not offer substantial evidence to rebut the presumption, the presumption provided by section 20(a) will entitle the claimant to compensation.[9] *See Del Vecchio v. Bowers*, 296 U.S. 280, 284-285, 102 S.Ct. 1312, 71 L.Ed.2d 495 (1935); *Universal Maritime Corp. v. Moore & Director, OWCP*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT)(9th Cir. 1999).

The employer must rebut the presumption with substantial evidence that the claimant's condition was not caused or aggravated by his employment. *Quinones v. H.B. Zachery*, 1998 WL 85580 (Ben. Rev. Bd. Feb. 10, 1998); *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996). Where aggravation of a pre-existing condition is at issue, the employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury.[10] *Quinones, supra; Cairns v. Matson Terminals*, 21 BRBS 252 (1988); *Zea v. West State, Inc.*, ___ BRBS ___, BRB No. 97-931 (April 9, 1998). In establishing rebuttal of the presumption, however, proof of another agency of causation is not necessary. *See Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982)(Kalaris, J., concurring & dissenting), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. den*., 467 U.S. 1243 (1984). The testimony of a physician that no relationship exists between an injury and the claimant's employment is sufficient to rebut the presumption. *Kier v. Bethlehem Steel Corp*., 16 BRBS 128 (1984).

If the Administrative Law Judge finds the presumption is rebutted, it no longer controls and he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *Devine v. Atlantic Container Lines, G.T.E.*, 25 BRBS 15 (1991). When the evidence as a whole is considered, it is the proponent (claimant) who has the burden of proof. *See, Director, OWCP v. Greenwhich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221, [28 BRBS 43(CRT)(1994)].

In the case *sub judice*, the claimant has alleged that the harm to his body, i.e., lower back and neck, resulted from the January 27, 1999 injury at the employer's river front facility. The employer has introduced no evidence severing the connection between the harm and the claimant's maritime employment. A claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a prima facie case and the invocation of the Section

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[9] While "substantial evidence requires 'more than a mere scintilla,' it is only 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 410, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971); *see Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982).

[10] In *Fargo v. Campbell Industries*, 9 BRBS 766 (1978), the Board affirmed an award of permanent total disability benefits, stating the aggravation of a pre-existing arthritic condition by a work-related injury was completely compensable under the LHWCA.

20(a) presumption. *See Sylvester v. Bethlehem Steel Corp*., 14 BRBS 234, 236 (1981), *aff'd sub. nom., Sylvester v. Director, OWCP*, 681 F.2d 359 (5th Cir. 1982). Thus, the claimant has established a prima facie claim that the harm suffered is a work-related injury.

A work-related aggravation of a pre-existing condition is an "injury" pursuant to Section 2(2) of the Act.[11] *Gardner v. Bath Iron Works Corporation*, 11 BRBS 556 (1979), *aff'd sub nom., Gardner v. Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981); *Preziosi v. Controlled Industries*, 22 BRBS 468 (1989); *Janusziewicz v. Sun Shipbuilding and Dry Dock Company*, 22 BRBS 376 (1989) (*Decision and Order on Remand*); *Johnson v. Ingalls Shipbuilding*, 22 BRBS 160 (1989); *Madrid v. Coast Marine Construction*, 22 BRBS 148 (1989).

Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if the employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513 (5th Cir. 1986)(*en banc*); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998)(hearing loss).

So, when a claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, an employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury.[12] *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046 (5th Cir. 1983); *Mijangos, supra; Hicks v. Pacific Marine & Supply Co.*, 14 BRBS 549 (1981). The section 20(a) presumption applies to the issue of whether the injury or disability is work-related. *Kubin v. Pro-Football, Inc*., 29 BRBS 117 (1995)(pre-existing injury). To rebut the presumption the employer must produce specific and comprehensive evidence that the Claimant's condition was not caused, aggravated, or contributed to by the work accident.[13] *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.

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[11] The term "injury" includes the aggravation of a pre-existing non-work-related condition or the combination of work-related and non-work-related conditions. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Care v. WMATA*, 21 BRBS 248 (1988).

[12] In *Grumbley v. Eastern Associated Terminals Co.*, 9 BRBS 650 (1979), the Board reversed an award for additional benefits where the claimant, who had a work-related injury to his knee, fell from his home's roof when repairing an antenna after the injured knee collapsed on him. The Board held, under Section 2(2) of the Act, to be compensable the second injury must be related to the original injury. The judge must determine whether the second injury resulted naturally or unavoidably. A claimant must show a degree of due care in regard to his injury.

[13] If the presumption is rebutted, it falls out of the case and the claimant must establish a causal relationship based on the record as a whole. *Universal Maritime Corp. v. Moore*, 126 F.3d 256 (4th Cir. 1997).

1976), cert. den., 429 U.S. 820 (1976). However, rebuttal of the presumption does not require proof of another agency of causation. *O'Kelley v. Dept. of the Army/NAF*, ___ BRBS ___, BRB No. 99-0810 (May 2, 2000).

The parties have agreed the January 27, 1999, incident constitutes a work-related injury. This is true whether it was an aggravation of Mr. Bell's prior neck and lower back injuries or a new event.

I conclude that the claimant has met his burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm. The employer has not presented substantial evidence which establishes rebuttal of the presumption, under Section 20(a) that the injury arose out of the claimant's employment.

DISABILITY

Section 2(10) of the LHWCA defines "disability" as the incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. 33 U.S.C. § 902(10). In order for a claimant to receive disability benefits, he must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Services of America*, 25 B.R.B.S. 100, 110 (1991); *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Owens v. Traynor*, 274 F. Supp. 770 (D.Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. *American Mutual Insurance Company of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (*Id*. at 1266).

The claimant bears the initial burden of establishing the nature and extent of any disability sustained as a result of a work-related injury without the benefit of the Section 20 presumption. *Lombardi v. Universal Maritime Service*, 32 BRBS 83 (1998); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); and, *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). However, once the claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981); *Air America v. Director*, 597 F.2d 773 (1st Cir. 1979); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989); *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984).

1. EXTENT OF DISABILITY - TOTAL vs. PARTIAL

A claimant has the burden of proving a *prima facie* case of total disability by showing he cannot return to his regular employment due to a work-related injury.[14] *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980). At the initial stage, a claimant need not establish he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988)(due to permanent restrictions against heavy lifting and excessive bending, employee could not resume usual job as sandblaster).

The Judge must compare the claimant's medical restrictions with the specific requirements of his usual employment. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). In doing so, an Administrative Law Judge is not bound to accept the opinion of any particular witness but rather, is entitled to weigh the credibility of all witness, including doctors, and draw his own inferences from the evidence. *Lombardi v. Universal Maritime Service*, 32 BRBS 83 (1998). The Board held, in *Lombardi*, that the credited medical opinion of a claimant's treating orthopedic surgeon, in connection with the claimant's testimony regarding his job requirements, constituted substantial evidence in support of a determination that the claimant's impairment prevented him from performing his usual employment duties. *Id*.

A claimant's credible complaints of pain alone may be enough to meet his burden. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Richardson v. Safeway Stores*, 14 BRBS 855 (1982); *Miranda v. Excavation Construction*, 13 BRBS 882, 884 (1981). However, a judge may find an employee able to do his ususal work despite complaints of pain, numbness, and weakness, when a physician finds no functional impairment. *Peterson v. Washington Metro Area Transit Authority*, 13 BRBS 891 (1981).

The claimant's testimony establishes that, as of the time of the hearing, he continued to suffer neck and lower back pain. That he suffers such pain is not only unrebutted, but remains uncontradicted. After receiving Mr. Dean's April 19, 1999 letter, Mr. Bell was seen by Dr. Liss, on April 26 and April 28, 1999. Dr. Liss continued him on light or restricted duty, i.e., sedentary work. Other than the claimant's testimony, Dr. Lieber's Functional Capacities" assessment is the best evidence of Mr. Bell's limitations. It shows the claimant "can" walk four hours per day, stand and drive two hours, and sit six hours. He cannot lift or carry items over 26 pounds, but may occasionally lift and carry 11-25 pound items and frequently lift and carry 0-10 pounds. He may fully use his hands and feet

[14] Even if able to work, one may be found totally disabled if working with extraordinary effort and in excruciating pain. *See Argonaut Ins. Co. v. Patterson*, 846 F.2d 715 (11th Cir. 1988) and *Louisiana Insurance Guaranty Association v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

for repetitive motions. He can only occasionally climb, balance, kneel, squat, crawl, twist, bend at the waist, or reach. (EX 2). The fact he cannot now perform regular heavy lifting, combined with his pain, establishes his partial disability.

On the basis of the record provided, I conclude that the claimant has established that he cannot return to work as a mechanic due to injuries suffered on January 27, 1999.

Suitable Alternate Employment

Once the claimant meets his *prima facie* showing that he cannot return to his usual work, the burden shifts to the employer to show suitable alternative employment or realistic job opportunities in the relevant geographic market which the claimant is capable, e.g., physically and educationally qualified, of performing and which he could secure if he diligently tried.[15] *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *Palombo v. Director, OWCP*, 937 F.2d 70, 73, 25 BRBS 1(CRT) (2d Cir. 1991); *Director, OWCP v. Bethlehem Steel Corp.*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991); *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980), *aff'g Hansen v. Bumble Bee Seafoods*, 7 BRBS 680 (1978); *Berezin v. Cascade General, Inc.*, ___ *BRBS* ___ (BRBS Nos. 00-0250 and 00-257, Nov. 14, 2000); *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. Sub. nom., Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993); *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 10 BRBS 614 (3rd Cir. 1979) *aff'g in pertinent part* 7 BRBS 333 (1977); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 765 10 BRBS 81, 86-87 (4th Cir. 1979); *American Stevedores, Inc., v. Salzano*, 538 F.2d 933, 4 BRBS 195 (2d Cir. 1976) *aff'g* 2 BRBS 178 (1975); *Rinaldi v. General Dynamics Corp*., 25 BRBS 131 (1990); *Pilkington v. Sun Shipping & Drydock Co.*, 9 BRBS 476, 477 (1978); *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987); *see Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988) and, *Bunge Corp. v. Carlisle*, 34 BRBS 79(CRT)(adopting test from First, Fourth, and Fifth Circuits for determining whether defendant offered suitable alternate employment).

While the claimant generally need not show that he has tried to obtain employment, *Shell v. Teledyne Movible Offshore, Inc.*, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. *Wilson v. Dravo Corporation*, 22 BRBS 463, 466 (1989); *Royce v. Elrich Construction Company*, 17 BRBS 156 (1985).

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[15] Once it is found an employer has not established the availability of suitable alternate employment, the issue of whether the claimant diligently sought work need not be addressed. *Carlisle v. Bunge Corp*., 33 BRBS 133, BRB No. 98-1604 (Sept. 13, 1999) n. 15, *citing Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988); *Williams v. Halter Marine Service, Inc*., 19 BRBS 248 (1987).

The employer need not show an actual job offer but must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried.[16] *Trans-State Dredging v. Benefits Review Board (Tarner)*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 97 (1988); *Piunti v. ITO Corp. of Baltimore*, 23 BRBS 367, 379 (1990). A failure to prove suitable alternative employment results in a finding of total disability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *American Stevedores v. Salzano*, 538 F.2d 933, 935 (2d Cir. 1976). If the employer establishes the existence of such employment, the employee's disability is treated as partial, not total. *Palombo; Rinaldi v. General Shipbuilding Co.*, 25 BRBS 128 (1991); *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544 (9th Cir. 1991). The claimant may rebut an employer's showing of alternative employment by demonstrating that he diligently tried but was unable to secure such employment. *Palombo*; *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540 (4th Cir. 1988)(and retain eligibility for total disability benefits); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir.), *cert. den.*, 479 U.S. 826 (1986).

In order to meet the burden of showing the availability of suitable alternative employment, the employer need not contact prospective employers to inform them of the qualifications and limitations of a claimant and to determine if they would, in fact, consider hiring the candidate for their position. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988). Likewise, an employer may meet its burden by demonstrating the availability of specific jobs in a local market and rely on standard occupational job descriptions to fill out the qualifications for performing such jobs without contacting prospective employers for the specific requirements in order to establish a valid vocational survey. *Universal Maritime Corp., v. Moore & Director, OWCP*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Here, the employer did not provide evidence of any other possible employment other than a position it had for the claimant.

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[16] There is some disagreement among the circuits as to what information employers must provide to meet the burden of showing suitable employment alternatives for claimants. The Ninth Circuit requires the employer to identify specific positions for a specific employer, that the claimant can perform and that the claimant could likely obtain, *see Hairston v. Todd Shipyards Corp*., 849 F.2d 1194, 1196 (9th Cir. 1988);*Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs*, 629 F.2d 1327,1329 (9th Cir. 1980), while the First, Fourth, Fifth and Seventh Circuits utilize a more moderate test in which employers must simply present evidence that a range of jobs exists that is reasonably available and that the disabled employee could realistically secure and perform, *see Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199,201 (4th Cir. 1984); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5thCir. 1981); *Air America, Inc. v. Director, Office of Workers' Compensation Programs*, 597 F.2d 773(1st Cir. 1979); and *Bunge Corporation and CIGNA Property and Casualty, Petitioners, v. Mark Carlisle*, United States Court of Appeals For the Seventh Circuit No. 99-3853 (September 19, 2000).

A job provided by employer may constitute evidence of suitable alternative employment if the tasks performed are necessary to employer, *Peele v. Newport News Shipbuilding & Dry Dock*, 18 BRBS 224, 226 (1987), and if the job is available to claimant. *Wilson v. Dravo Corp.*, 22 BRBS 463, 465 (1989); *Beaulah v. Avis Rent-A-Car*, 19 BRBS 131, 133 (1986).[17] If the employer's proof of suitable alternative employment is based on such a job, the judge must ascertain whether a specific job was offered to the claimant and then to determine whether he could perform the duties thereof. *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001).

The only description of the work the claimant was offered by the employer, on or after April 5, 1999, came from the claimant. Although, Mr. Dean's letter refers to a light-duty position and offered a 40-hour work week or nothing, it did not describe the job duties. The medical evidence establishes Mr. Bell was approved for light duty or restricted work. Mr. Bell did not return to work because, after his previous unsuccessful attempts, he felt he could not work at the job for eight-hours day, 40-hour week, until June 9, 1999. The record contains nothing explicitly corroborating Mr. Dean's assertion, in the April 19, 1999 letter, that Dr. Liss had approved a 40-hour work week. But, neither does the evidence show the total work hours per week or per day were limited. Since the employer has not established what the light job duties were to be or if within any medical temporal limitations, it has failed in its burden of establishing alternate employment between April 5 and June 9, 1999. However, the claimant's own testimony establishes his post-June 9, 1999, job duties are within the medically-established work limitations.

Previously, the Benefits Review Board had held that when the employee has reached permanency and suitable alternative employment is established thereafter, it is reasonable to conclude that the onset date of the partial disability is the date of permanency, irrespective of when the first evidence establishing the availability of suitable alternative employment was gathered. *Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 253 n.5 (1985). After several Circuits rejected this view, the Board held that "a showing of suitable alternate employment may not be applied retroactively to the date the injured employee reached maximum medical improvement and that an injured employee's total disability becomes partial on the earliest date the employer shows suitable alternate employment to be available." *Rinaldi v. General Dynamics*, 25 BRBS 128 (1991) at 131. The *Rinaldi* rationale applies in all Circuits now. Thus, "an injured employee who establishes an inability to return to his usual employment duties with his employer is entitled to an award of permanent total disability compensation from the date maximum medical

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[17] An employer is not actually required to place a claimant in alternate employment, and the fact that an employer does not identify suitable alternative employment until the day of the hearing does not preclude a finding that the employer has met its burden. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236-237 n.7 (1985). Nonetheless, the Administrative Law Judge may reasonably conclude that an offer of a position within employer's control on the day of the hearing is not bona fide. *Diamond M Drilling Co. v. Marshall*, 577 F.2d 1003, 1007-9 n.5, 8 BRBS 658, 661 n.5 (5th Cir. 1979); *Jameson v. Marine Terminals*, 10 BRBS 194, 203 (1979). Nor does an employer satisfy this test by pointing to the only one internal light-duty job the claimant held prior to a layoff unrelated to his disability. *Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 33 BRBS 170(CRT)(4th Cir. 1999).

improvement is established to the date on which the employer demonstrates the availability of suitable alternate employment." *Rinaldi* at 129.

In view of the foregoing, I am simply unable to determine whether or not the job, before June 9, 1999, constitutes, as a matter of fact or law, suitable alternative employment or a realistic job opportunity.

On the basis of the totality of this record, I find and conclude that the claimant has established that he cannot return to work as a mechanic. The burden thus rested upon the employer to demonstrate the existence of suitable alternative employment in the area. Since the employer did not carry this burden through June 9, 1999, the claimant is entitled to a finding of temporary total disability through June 9, 1999. *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Southern v. Farmers Export Company*, 17 BRBS 64 (1985).

2. NATURE OF DISABILITY - PERMANENT vs. TEMPORARY

A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *General Dynamics Corporation v. Benefits Review Board*, 565 F.2d 208 (2d Cir. 1977); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989); *Trask v. Lockheed Shipbuilding and Construction Company*, 17 BRBS 56 (1985); *Mason v. Bender Welding & Machine Co.*, 16 BRBS 307, 309 (1984).

The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." An injured worker's impairment may be found to have changed from temporary to permanent if and when the employee's condition reaches the point of "maximum medical improvement" or "MMI."[18] *James v. Pate Stevedoring Co*., 22 BRBS 271, 274 (1989); *Phillips v. Marine Concrete Structures*, 21 BRBS 233, 235 (1988); *see SGS Control Services v. Director, OWCP*, 86 F.3d 438, 443-44 (5th Cir. 1996); *Director, OWCP, v. Berkstresser*, 921 F.2d 306, 312 (D.C. Cir. 1991). Any disability before reaching MMI would be temporary in nature. *Id*.

The determination of when maximum medical improvement is reached, so that a claimant's disability may be said to be "permanent," is primarily a question of fact based on medical evidence. *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Washington Metropolitan Area Transit*

[18] If a claimant shows he is disabled under the Act and MMI has not been reached, the appropriate remedy is an award of temporary total or partial disability, under Section 8(b) or (e). *Carlisle v. Bunge Corp*., 33 BRBS 133, BRB No. 98-1604 (Sept. 13, 1999) *n. 10, citing* 33 U.S.C. § 908(b) and *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).

Authority, 21 BRBS 248 (1988); *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988); *Eckley v. Fibrex and Shipping Company*, 21 BRBS 120 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979).

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition becomes permanent is primarily a medical determination, regardless of economic or vocational considerations. *Manson v. Bender Welding & Machine Co.*, 16 BRBS 307, 309 (1984); *Louisiana Insurance Guaranty Association v. Abbott*, 40 F. 3d 122 (5th Cir. 1994)(doctor said nothing further could be done); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988). Medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 60 (1985). A date of permanency may not be based, however, on the mere speculation of a physician.[19] *See Steig v. Lockheed Shipbuilding & Construction Co.*, 3 BRBS 439, 441 (1976). Furthermore, evidence of the ability to do alternate employment is not relevant to the determination of permanency. *Berkstresser v. Washington Metro. Area Transit Authority*, 16 BRBS 231, 234 (1984), *rev'd on other grounds sub nom., Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990).

An Administrative Law Judge must make a specific factual finding regarding maximum medical improvement, and cannot merely use the date when temporary total disability is cut off by statute. *Thompson v. Quinton Engineers*, 14 BRBS 395, 401 (1985). In the absence of any other relevant evidence, the judge may use the date the claim was filed. *Whyte v. General Dynamics Corp.*, 8 BRBS 706, 708 (1978).

Where the medical evidence indicates that the worker's condition is improving and the treating physician anticipates further improvement in the future, it is not reasonable for a judge to find that maximum medical improvement has been reached. *Dixon v. John J. McMullen & Assocs.*, 19 BRBS 243, 245 (1986). Similarly, where a treating physician stated that surgery might be necessary in the future and that the claimant should be reevaluated in several months to check for improvement, it was reasonable for the Administrative Law Judge to conclude the claimant's condition was temporary rather than permanent. *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25, 32 (1986), *pet. dismissed sub nom., Cooper Stevedoring Co. v. Director, OWCP*, 826 F.2d 1011 (11th Cir. 1987); *Kuhn v. Associated Press*, 16 BRBS 46, 48 (1983).

Permanent disability has been found where little hope exists of eventual recovery, *Air America, Inc. v. Director, OWCP*, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large

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[19] In *Ion v. Duluth, Missabe & Iron Range Railway Co.*, 31 BRBS 75 (1997), the Board found it proper to credit a physician's opinion setting an MMI date after issuance of ALJ's decision based on the normal healing period following knee surgery and not merely on the eventuality the condition may further improve in the future.

number of treatments over a long period of time, *Meecke v. I.S.O. Personnel Support Department*, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, where work within claimant's work restrictions is not available, *Bell v. Volpe/Head Construction Co.*, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone.[20] *Eller and Co. v. Golden*, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, *Ballard v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 676 (1978); *Ruiz v. Universal Maritime Service Corp.*, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. *Bell, supra. See also Walker v. AAF Exchange Service*, 5 BRBS 500 (1977); *Swan v. George Hyman Construction Corp.*, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability. *Mendez v. Bernuth Marine Shipping, Inc.*, 11 BRBS 21 (1979); *Perry v. Stan Flowers Company*, 8 BRBS 533 (1978).

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. *Meecke v. I.S.O. Personnel Support Department*, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. *Exxon Corporation v. White*, 617 F.2d 292 (5th Cir. 1980), *aff'g* 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. *Fleetwood v. Newport News Shipbuilding and Dry Dock Company*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985); *Watson v. Gulf Stevedore Corp., supra*..

The Board has held that an irreversible medical condition is permanent *per se*. *Drake v. General Dynamics Corp.*, 11 BRBS 288 (1979).

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[20] Claimant's credible testimony of the constant pain endured while performing work activity may constitute a sufficient basis for an award notwithstanding considerable evidence the claimant can perform certain types of work activity. *Mijangos v. Avondale Shipyards, Inc*., 948 F.2d 941, 25 BRBS 78 (5th Cir. 1991).

Both the medical evidence and the claimant's own testimony establish that his neck and lower back pain continue. There has been a discussion of further therapy, diagnostic tests, and on-going need for medications. Despite Dr. Lieber's comment that Mr. Bell's lumbrosacral strain/sprain has resolved, his neck injury continues and the parties conditionally agreed he has not reached MMI. (TR 36). However, although, in August 2001, Dr. Lieber stated the lower back strain had resolved, he attached a Functional Capacities assessment which continued to limit the types of work the claimant was allowed to perform. Many of the limitations he sets forth do not appear to be limited to care of the claimant's lower back problems.

On the basis of the totality of the record and the parties' agreement, I find and conclude that the claimant has not reached maximum medical improvement with respect to both his injuries. Thus, he is not permanently disabled as of the present.

3. CONCLUSIONS REGARDING NATURE & EXTENT OF DISABILITY

In conclusion, based on the credible testimony of the claimant, and fully supported by the medical opinions , I find that the claimant is entitled to temporary total disability benefits from April 5, 1999 through June 9, 1999 and temporary partial[21] disability benefits thereafter.

MEDICAL EXPENSES AND BENEFITS

Section 7(a) of the LHWCA provides that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a); *see also* 20 C.F.R. § 702.401. In order for a claimant to receive medical expenses, his injury must be work-related. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). If an employer is found to be liable for the payment of compensation pursuant to an award of disability, it follows, in accordance with Section 7(a), that the employer is likewise liable for medical expenses incurred as a result of the claimant's injury. *Perez v. Sea-Land Servs, Inc.*, 8 BRBS 130, 140 (1978).[22]

A claimant has established a prima facie case for compensable medical treatments when a physician finds treatment necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). In order for an employer to be liable for a claimant's medical

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[21] One who is temporarily and partially disabled is entitled to the usual measure of benefits but for only five years. Despite sustaining a scheduled injury, if an employee is still receiving treatment for the condition (which has not yet reached maximum medical improvement) and he is employed but has sustained a loss of wage-earning capacity, he is entitled to temporary partial disability benefits based upon such loss. *Cox v. Newport News Shipbuilding & Dry Dock Co.*, 9 BRBS 791 (19789), *aff'd sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979).

[22] *See Shriver v. General Dynamics Corp*., 34 BRBS 370(ALJ)(2000) for an exhaustive list of medical expenses the appellate courts and the Board have approved and disapproved.

expenses pursuant to Section 7(a), the expenses must be reasonable and necessary.[23] *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). The employer must raise the issue of reasonableness and necessity of treatment. *Salusky v. Army Air Force Exchange Service*, 2 BRBS 22, 26 (1975). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 22 (1988); *Barbour v. Woodward & Lothrop, Inc*., 16 BRBS 300 (1984).

An employee's right to select his own physician, pursuant to Section 7(b), is well-settled. *Bulone v. Universal Terminal and Stevedore Corp.*, 8 BRBS 515 (1978); 20 C.F.R. § 702.403; *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998) *modified*, 164 F.3d 480 (1999). A claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. *Tough v. General Dynamics Corporation*, 22 BRBS 356 (1989); *Gilliam v. The Western Union Telegraph Co.*, 8 BRBS 278 (1978); 20 C.F.R. § 702.401(a); *but see Shoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996)(expenses may be limited to those costs which would have been incurred locally).

In *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. *Banks v. Bath Iron Works Corp.*, 22 BRBS 301, 307, 308 (1989); *Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 15 BRBS 299 (1983); *Beynum v. Washington Metropolitan Area Transit Authority*, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. *Atlantic & Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908 (5th Cir. 1971); *Matthews v. Jeffboat, Inc.*, 18 BRBS at 189 (1986). The burden of proving compliance with section 7(d) is on the claimant. *Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 407, 10 BRBS 1, 8 (4th Cir. 1979), *rev'g* 6 BRBS 550 (1977).

An employer's physician's determination that the claimant is fully recovered is tantamount to a refusal to provide treatment. *Slattery Associates, Inc. v. Lloyd*, 725 F.2d 780 (D.C. Cir. 1984); *Walker v. AAF Exchange Service*, 5 BRBS 500 (1977); *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968, 970 (D.C. Cir. 1982) (per curium), *rev'g* 13 BRBS 1007 (1981), *cert. denied*, 459 U.S. 1146 (1983). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. *Roger's Terminal and*

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[23] The employer is liable for medical services for all legitimate consequences of the compensable injury, including the chosen physician's unskillfulness or errors of judgment. *Linsay v. George Wash. Univ*., 279 F.2d 819 (D.C. Cir. 1960); *see also Austin v. Johns-Manville Sales Corp*., 508 F.Supp. 313 (D. Me. 1981). *Wheeler v. Interocean Stevedoring*, 21 BRBS 33 (1988)(Improper, unauthorized medical treatment is not reimbursable).

Shipping Corporation v. Director, OWCP, 784 F.2d 687 (5th Cir. 1986); *Anderson v. Todd Shipyards Corp*., 22 BRBS 20 (1989); *Ballesteros v. Willamette Western Corp*., 20 BRBS 184 (1988).

It is my understanding that although the claimant has submitted unpaid medical bills ($1,157.70) that the employer had agreed to pay the same. (TR 8).

In light of my findings above that the claimant is temporarily partially disabled due to injuries to his neck and lower back he suffered in the January 27, 1999, accident, I find this treatment for his injuries compensable under the Act.[24]

COMPENSATION FORMULAE[25]

Section 8 of the Act, sets forth the scheme for the payment of compensation for disability.[26] Section 8(a) deals with permanent total disability. Section 8(b) deals with temporary total disability. Section 8(c) deals with permanent partial disability. Section 8(d) deals with payment to survivors of certain unpaid employee benefits. Section 8(e) deals with temporary partial disability.[27]

Temporary Partial Disability[28]

Section 8(e) provides that in the case of temporary partial disability, the compensation is 66 2/3 percent of the difference between the employee's AWW before the injury and his wage-earning capacity after the injury, in the same or another employment, for the continuance of such disability, but

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[24] See 20 C.F.R. § 702.413 when there is a dispute concerning the amount of a medical bill.

[25] Benefits may not be awarded for pain and suffering. *Young v. Todd Pacific Shipyards Corp*., 17 BRBS 201 (1985). In cases under the schedule where a claimant has a prior injury which has already been compensated, under the Act, and a subsequent injury results in increased disability to the scheduled body part, the employer is only liable for the increased disability. *Clark v. Todd Shipyards Corp*., 20 BRBS 30, 31 (1987) *aff'd sub. nom. Todd Shipyards Corp. v. Director, OWCP*, 848 F.2d 125, 21 BRBS 114 (CRT)(9th Cir. 1988); *Brown v. Bethlehem Steel Corp*., 19 BRBS 200, *on recon*., 20 BRBS 26 (1987), *aff'd in pertinent part sub. nom., Director, OWCP v. Bethlehem Steel Corp*., 868 F.2d 759, 22 BRBS 47 (CRT)(5th Cir. 1989).

[26] Section 6(b)(1) imposes a cap on both disability and death benefits equivalent to 200 percent of the national average weekly wage.

[27] No compensation, except medical benefits, may be paid for the first three days of a disability unless the injury results in disability of more than fourteen days. 33 U.S.C. § 906(a).

[28] It is improper to award concurrent permanent partial disability awards for multiple disabilities which exceed the LHWCA's limitation for permanent total disability to two-thirds of a claimant's average weekly wage. See, 31 U.S.C. § 908(a). *Green v. I.T.O. Corp. Of Baltimore*, Case No. 97-1072, 33 BRBS 139(CRT)(4th Cir. 1999); *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997).

in no case exceeding five years. *See Turk v. Eastern Shore Railroad Inc., & Director, OWCP,* 34 BRBS 27 (BRB 2000)(allowing award beyond hearing date) and *Admiralty Coatings Corp. v. Emery*, ___ F.3d ___ (4th Cir. No. 97-2639)(Sept. 21, 2000)(Authority to award TPD benefits beyond date of evidentiary hearing).

Here, the claimant is earning $1.00 per hour more than the $17.86 per hour he had prior to the injury. However, since returning to full time work he has not been afforded the opportunity to earn the approximate 26 hours per week over time he had previously earned. This was two hours per week day and eight hours on Saturday and Sunday. He admitted there was an economic slow down between June and September 1999, during which overtime was not available for almost anyone. He also admitted he did not always work on Sundays when he would be paid double.

Now he earns $18.76 per hour for forty hours a week for a total of $750.40. In the past he earned $17.86 for forty hours or $714.40 per week. He would earn an additional $214.32 for eight hours on Saturdays and $285.76 double time for Sundays when he worked. There is little reliable evidence about how often he worked Sundays, so I would otherwise find he worked one Sunday per month on average. Thus, his Sunday earnings would have been an average of $71.44 per week. Thus, his former weekly earnings would have been $1000.16 per week. That is $249.76 more than he earns now. Two-thirds of that is $166.34. However, the parties agreed his AWW was $1369.00. The difference between $1369.00 and the $750.40 he earns now is $618.60. Two-thirds of that is $411.99. He is therefore entitled to $411.99 per week additional compensation during his period of temporary partial disability, September 1, 1999 through the present and continuing thereafter until either permanency, resolution, or five years is reached.

Temporary Total Disability

Under section 8(b), in cases of temporary total disability, the employee is compensated with 66 2/3 percent of the AWW during the period of the disability. The period of disability was April 5 through June 9, 1999. His AWW was $1369.00. Two-thirds of the AWW is $912.58. Thus, the claimant is entitled to $912.58 per week during that period, less any wages he may have been paid during that time frame or other credits due the employer for compensation benefits paid..

AVERAGE WEEKLY WAGE

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. *Todd Shipyards Corp. v. Black*, 717 F.2d 1280 (9th Cir. 1983) *cert. denied*, 466 U.S. 937, 104 S.Ct. 1910, 80 L.Ed.2d 459 (1984); *Hoey v. General Dynamics Corporation*, 17 BRBS 229 (1985); *Pitts v. Bethlehem Steel Corp.*, 17

BRBS 17 (1985); *Yalowchuck v. General Dynamics Corp.*, 17 BRBS 13 (1985). Compensation should be calculated at the time of disability, not the time of the injury. *Johnson v. Director, OWCP*, 911 F.2d 247 (9th Cir. 1990); *Bourgeois v. Avondale Shipyards & Director, OWCP*, 121 F.3d 219, 31 BRBS 137(CRT)(5th Cir. 1997); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995)(involving a latent disability surfacing years after the initial injury).

The Act provides three methods for computing a claimant's average weekly wage: the first, where an employee has worked in his regular employment substantially the whole of the year preceding his injury; the second, where the employee did not so work; and, the third, where neither of the former two methods can be reasonably and fairly applied.

The parties have stipulated and I find that the claimant's average weekly wage is $ 1369.00.

INTEREST

A claimant is entitled to interest on any accrued unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in part sub nom., Newport News Shipbuilding & Dry Dock Company v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The rate is that used by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills… ." *Grant v. Portland Stevedoring Co.*, 16 BRBS 267, 270 (1984), *modified on recon.*, 17 BRBS 20 (1985). Interest is mandatory and cannot be waived in contested cases. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 (1982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 734 (1978). The Board has held that the date that employer knows of an injury and therefore incurs an obligation to pay benefits under 33 U.S.C. § 914(b) is critical in determining the onset date for the accrual of interest. *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101 (1996)(retired employee with hearing loss), at 105-106; *Meadry v. International Paper Co.*, 30 BRBS 160 (1996).

Here, the employer knew of the claimant's injury on April 5, 1999 and did not continue the payment of benefits. Thus, interest must accrue from that date.

V. CONCLUSIONS

I find that Mr. Bell has been and is partially and temporarily disabled from June 9, 1999 until the present and continuing, as set forth above. He was totally and temporarily disabled from performing his employment as a mechanic between January 28, 1999 and June 8, 1999. The responsible employer/carrier is named. Maximum medical improvement has not been reached with respect to both his injuries. His average weekly wage was $1369.00. Furthermore, the employer is

liable for all reasonable and necessary medical expenses incurred in the treatment of the claimant's disability, including the $1,157.70 listed. The claimant is further entitled to interest, at the appropriate rate on the accrued unpaid compensation benefits.

VI. ATTORNEY'S FEES AND COSTS

Thirty (30) days is hereby allowed to the claimant's counsel for the submission of such an application. See, 20 C.F.R. § 702.132. A service sheet showing that service has been made upon all the partes, including the claimant, must accompany the application. Parties have fifteen (15) days following receipt of any such application within which to file any objections.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively corrected by the District Director.

It is therefore ORDERED that:

1. The respondent shall pay to the claimant compensation for his temporary total disability from April 5 through June 9, 1999, based upon an average weekly wage of $1369.00, such compensation to be computed in accordance with section 8(b) of the Act.

2. The respondent shall pay to the claimant compensation for his temporary partial disability from September 1, 1999, to the present and continuing thereafter until either permanency, resolution, or five years is reached, based upon an average weekly wage of $1369.00, such compensation to be computed in accordance with section 8(b) of the Act.

3. Between June 9 and August 31, 1999 (when no overtime was available), the rate for his temporary partial disability shall be $618.60 (difference between AWW and current weekly earnings) minus $428.64 (former overtime) times two-thirds or $126.51 per week.

4. The Respondent shall receive credit for all amounts of compensation previously paid to the claimant as a result of his January 27, 1999 injury.

5. Interest shall be paid by the Employer/Respondent on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director. All under-payments of compensation shall be paid to the claimant in a lump sum with interest at the rate provided in 28 U.S.C. § 1961.

6. Pursuant to § 7 of the Act, the employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the claimant's work-related injury referenced herein may require subject to the provisions of section 7 of the Act. The $1.157.70 in unpaid medical expenses shall be reimbursed.

7. All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.[29]

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RICHARD A. MORGAN
Administrative Law Judge

RAM:dmr

APPEAL RIGHTS: Appeals may be taken to the Benefits Review Board, U.S. Department of Labor, Washington, D.C. 20210, by filing a notice of appeal with the district director for the compensation district in which the decision or order appealed from was filed, within thirty (30) days of the filing of the decision or order, and by submitting to the Board a petition for review, in accordance with the provisions of part 802 of 20 C.F.R..

[29] Motions for reconsideration before the ALJ are not provided for in the regulations (except 20 C.F.R. 802.221 BRB rules), are governed by FRCP 6(a) and must be filed within ten days (excluding weekends and holidays in most cases). *Galle v. Ingalls Shipbuilding, Inc*., 35 BRBS 17 (CRT), BRB No. 98-1635 (Sept. 20, 1999), ___F.3d ___ , Case No. 00-60075 (5th Cir. 2001).